

Mar 05, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SYLVIA R.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:17-CV-05177-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 15, 20. Attorney Chad Hatfield represents Sylvia R. (Plaintiff); Special Assistant United States Attorney Jeffrey E. Staples represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 14. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI),

1 Disability Insurance Benefits (DIB), and Disabled Widow's Benefits (DWB) on
2 September 12, 2013, Tr. 97-98, 108, alleging disability since January 1, 2013, Tr.
3 261, 268-69, 275, due to trigeminal neuralgia, carpal tunnel, pain on the left side,
4 migraines, and a cough. Tr. 306. The applications were denied initially and upon
5 reconsideration. Tr. 257-62, 168-73. Administrative Law Judge (ALJ) Larry
6 Kennedy held hearings on February 4, 2016 and June 7, 2016 and heard testimony
7 from Plaintiff and vocational expert Fred Cutler. Tr. 41-96. Plaintiff amended her
8 date of onset to June 1, 2014. Tr. 49-50. The ALJ issued an unfavorable decision
9 on June 22, 2016. Tr. 22-35. The Appeals Council denied review on August 28,
10 2017. Tr. 1-6. The ALJ's June 22, 2016 decision became the final decision of the
11 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §§
12 405(g), 1383(c). Plaintiff filed this action for judicial review on October 24, 2017.
13 ECF Nos. 1, 4.

14 **STATEMENT OF FACTS**

15 The facts of the case are set forth in the administrative hearing transcript, the
16 ALJ's decision, and the briefs of the parties. They are only briefly summarized
17 here.

18 Plaintiff was 58 years old at the amended date of onset. Tr. 261. Plaintiff
19 did not complete high school, but did obtain her GED. Tr. 52, 307. Her reported
20 work history includes the jobs of assistant specialist II, caregiver, receptionist, and
21 teacher's aide. Tr. 313, 325. When applying for benefits Plaintiff reported she
22 was babysitting her grandchildren eight hours per day, five days per week and
23 earning \$804.00 per month. Tr. 306, 325. However, she stated that her conditions
24 first started bothering her on January 1, 2013. Tr. 306.

25 **STANDARD OF REVIEW**

26 The ALJ is responsible for determining credibility, resolving conflicts in
27 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
28 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,

1 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
2 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
3 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
4 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
5 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
6 another way, substantial evidence is such relevant evidence as a reasonable mind
7 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
8 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
9 interpretation, the court may not substitute its judgment for that of the ALJ.
10 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
11 findings, or if conflicting evidence supports a finding of either disability or non-
12 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
13 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
14 evidence will be set aside if the proper legal standards were not applied in
15 weighing the evidence and making the decision. *Browner v. Secretary of Health*
16 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

17 **SEQUENTIAL EVALUATION PROCESS**

18 The Commissioner has established a five-step sequential evaluation process
19 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
20 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
21 through four, the burden of proof rests upon the claimant to establish a prima facie
22 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
23 burden is met once the claimant establishes that physical or mental impairments
24 prevent her from engaging in her previous occupations. 20 C.F.R. §§ 404.1520(a),
25 416.920(a)(4). If the claimant cannot do her past relevant work, the ALJ proceeds
26 to step five, and the burden shifts to the Commissioner to show that (1) the
27 claimant can make an adjustment to other work, and (2) the claimant can perform
28 specific jobs which exist in significant numbers in the national economy. *Batson v.*

1 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the
2 claimant cannot make an adjustment to other work in the national economy, a
3 finding of “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

4 **ADMINISTRATIVE DECISION**

5 On June 22, 2016, the ALJ issued a decision finding Plaintiff was not
6 disabled as defined in the Social Security Act from June 1, 2014 through the date
7 of the decision.

8 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
9 activity since June 1, 2014, the amended date of onset. Tr. 27.

10 At step two, the ALJ determined that Plaintiff had the following severe
11 impairments: trigeminal neuralgia; carpal tunnel syndrome; and obesity. Tr. 27.

12 At step three, the ALJ found that Plaintiff did not have an impairment or
13 combination of impairments that met or medically equaled the severity of one of
14 the listed impairments. Tr. 29.

15 At step four, the ALJ assessed Plaintiff’s residual function capacity and
16 determined she could perform a range of light work “with some additional
17 limitations. The claimant cannot climb and crawl. She can frequently handle and
18 finger. The claimant must avoid concentrated exposure to hazards and heights.”
19 Tr. 30. The ALJ identified Plaintiff’s past relevant work as a child monitor and as
20 a composite job containing elements from eligibility worker and social service aid.
21 Tr. 33. He found that she could perform this past relevant work. Tr. 33.

22 In the alternative to finding Plaintiff ineligible at step four, the ALJ made a
23 step five determination that, considering Plaintiff’s age, education, work
24 experience and residual functional capacity, and based on the testimony of the
25 vocational expert, there were other jobs that exist in significant numbers in the
26 national economy Plaintiff could perform, including the jobs of hand packager and
27 agricultural product packer. Tr. 35. The ALJ concluded Plaintiff was not under a
28 disability within the meaning of the Social Security Act from June 1, 2014, through

1 the date of the ALJ's decision. Tr. 35.

2 ISSUES

3 The question presented is whether substantial evidence supports the ALJ's
4 decision denying benefits and, if so, whether that decision is based on proper legal
5 standards. Plaintiff contends the ALJ erred by (1) failing to make a proper step
6 four determination; (2) failing to make a proper step five determination; (3) failing
7 to properly weigh the opinion of Plaintiff's treating physician; (4) failing to fully
8 develop the record; (5) failing to make a proper step two determination; and (6)
9 failing to properly consider Plaintiff's symptom statements.

10 DISCUSSION¹

11 1. Step Four

12 Plaintiff argues that the ALJ erred at step four by failing to meet the
13 requirements of S.S.R. 82-62. ECF No. 21 at 7 *citing* *Pinto v. Massanari*, 249 F.3d
14 840 (9th Cir. 2001). At the hearing, the ALJ presented the vocational expert with a
15 hypothetical limiting the individual to medium exertional work. Tr. 89. Yet, in his
16 decision, the ALJ found Plaintiff's residual functional capacity to include a
17 limitation to light exertional work. Tr. 30. However, despite this difference
18 between the hypothetical given to the vocational expert and the ALJ's residual
19 functional capacity determination, the ALJ adopted all of the vocational expert's
20 findings in his decision at steps four and five. Tr. 33-35.

21
22 ¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 At step four, the claimant has the burden to show that she no longer has the
2 capacity to perform her past relevant work. *Tackett*, 180 F.3d at 1098-99; *Pinto*,
3 249 F.3d at 844. The Commissioner may deny benefits at step four if the claimant
4 can still perform (1) a specific prior job as “actually performed”; or (2) the same
5 kind of work as it is “generally performed” in the national economy. *Pinto*, 249
6 F.3d at 845 (citing S.S.R. 82-61).

7 Although the claimant has the burden of proof at step four, an ALJ must still
8 make “the requisite factual findings” to support his conclusions. *Pinto*, 249 F.3d at
9 844. An ALJ’s determination at step four “must be developed and explained fully”
10 and contain the following specific findings of fact: (1) the claimant’s residual
11 functional capacity; (2) the physical and mental demands of the past relevant
12 job/occupation; and (3) that the claimant’s residual functional capacity would
13 permit a return to her past job or occupation. *See* S.S.R. 82-62.

14 In the ALJ’s decision, he made the following factual findings: (1) Plaintiff
15 had a light residual functional capacity with some additional limitations, Tr. 30; (2)
16 Plaintiff’s past relevant work consisted of two jobs: a child monitor, which is a
17 medium, unskilled job; and a composite job containing elements of both eligibility
18 worker, which is a sedentary, skilled job, and social service aide, which is a light,
19 skilled job, Tr. 33; and (3) Plaintiff retained the ability to perform the child
20 monitor job as both actually performed and customarily performed in the national
21 economy, and she retained the ability to perform the composite job as she actually
22 performed it. Tr. 34.

23 First, the ALJ erred in his conclusion that a light residual functional capacity
24 allowed a person to return to the medium, unskilled job of child monitor as it is
25 generally performed in the national economy. There is no factual finding by the
26 ALJ that the job as Plaintiff actually performed it was anything other than at the
27 medium exertional level. Tr. 33-34. Therefore, the ALJ also erred in his
28 determination that Plaintiff could perform the job as she actually performed it.

1 Second, the ALJ erred in his step four determination regarding the
2 composite job. Where past relevant work consists of “significant elements of two
3 or more occupations” (i.e., is a “composite job”), benefits may not be denied based
4 on a claimant’s ability to do the same type of work as “generally performed.” *Lee*
5 *v. Astrue*, 2012 WL 3637637 (W.D. Wash. July 26, 2012); *see also* Program
6 Operations Manual (“POMS”) DI 25005.020(B) (“A composite job does not have
7 a [Dictionary of Occupational Titles] counterpart, so do not evaluate it at the part
8 of step 4 considering work “as generally performed in the national economy.”). A
9 “composite” job necessarily has no specific counterpart in the Dictionary of
10 Occupational Titles, and thus must be evaluated “according to the particular facts
11 of each individual case.” S.S.R. 82-61. A claimant may be found capable of
12 performing such a composite job only if she is able to perform the requirements of
13 all elements of the prior position. *Id.*; *see also* POMS § DI 25005.020(B).

14 Here the ALJ failed to make the required factual findings regarding the
15 requirements of the composite job. Additionally, the vocational expert’s testimony
16 that a person similarly situated to Plaintiff could perform the composite job was
17 based on a hypothetical residual functional capacity with a medium exertional
18 level. Tr. 89. The ALJ provided a footnote in his decision, that if Plaintiff were
19 limited to a light or sedentary residual functional capacity, she could still perform
20 the composite job title, “which are performed at the sedentary level.” Tr. 34. Once
21 again, the ALJ made no finding that the composite job was sedentary as performed
22 and the footnote fails to indicate whether the phrase “which are performed” refers
23 to how the jobs are performed in the national economy or how Plaintiff performed
24 these jobs. Tr. 34. Therefore, the ALJ erred at step four.

25 Defendant argues that Plaintiff’s challenge to the ALJ’s step four
26 determination was solely premised on the ALJ’s rejection of the medical opinions
27 in the record and Plaintiff’s symptom statements. ECF No. 20 at 8. However,
28 Plaintiff’s step four challenge was based on the ALJ presenting an incomplete

hypothetical to the vocational expert. ECF No. 15 at 19. Considering the ALJ's hypothetical to the vocational expert was for a limitation to medium work, and the residual functional capacity determination was for a limitation to light work, Plaintiff's challenge is sufficient to allow this Court to address the ALJ's error.

2. Step Five

Plaintiff also argues that the ALJ failed to meet his burden in the alternative step five determination. ECF No. 15 at 20. At step five, the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work, and (2) specific jobs which the claimant can perform exist in the national economy. *Batson*, 359 F.3d at 1193-94. Here, the ALJ found that Plaintiff could perform the jobs of hand packager and agricultural product packer, both of which are medium, unskilled jobs. Tr. 35. Once again, the ALJ's residual functional capacity determination limiting Plaintiff to light exertional work is wholly inconsistent with a step five finding that Plaintiff could perform medium exertional jobs. Therefore, the ALJ failed to meet his burden at step five.

Defendant's response to Plaintiff's step five challenge was to simply assert that any error would be harmless because the ALJ's step four determination was supported by substantial evidence. ECF No. 20 at 8. However, as addressed above, the ALJ erred at step four. This error at step five is fatal to the ALJ's determination. Therefore, the case is remanded for additional proceedings.

3. Duty to Develop the Record

Plaintiff asserts that the ALJ failed to fully develop the record by failing to send Plaintiff for consultative examinations. ECF No. 15 at 14-16.

"In Social Security cases the ALJ has a special duty to fully and fairly develop the record and to assure that the claimant's interests are considered." *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996). "An ALJ's duty to develop the record . . . is triggered only when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence." *Mayes v.*

1 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001); *Webb v. Barnhart*, 433 F.3d 683,
2 687 (9th Cir. 2005) (“The ALJ’s duty to supplement a claimant’s record is
3 triggered by ambiguous evidence, the ALJ’s own finding that the record is
4 inadequate[,] or the ALJ’s reliance on an expert’s conclusion that the evidence is
5 ambiguous.”). The ALJ may discharge this duty in several ways, including:
6 subpoenaing the claimant’s physicians, submitting questions to the claimant’s
7 physicians, continuing the hearing, or keeping the record open after the hearing to
8 allow supplementation of the record.” *Tonapetyan v. Halter*, 242 F.3d 1144, 1150
9 (9th Cir. 2001).

10 In his decision, the ALJ addressed the opinions of two medical
11 professionals: (1) Plaintiff’s treating physician, Dr. Brooks and (2) State Agency
12 Reviewer, Dr. Rubio. Tr. 32-33. The ALJ gave controlling weight to the opinion
13 of Dr. Rubio and rejected the opinions provided by Dr. Brooks. *Id.* Two reasons
14 the ALJ provided for rejecting the opinions of Dr. Brooks were that his opinion
15 was not supported in the record and the evidence did not show that the
16 impairments he listed in his opinions were medically determinable. Tr. 33. In his
17 first opinion, Dr. Brooks listed Plaintiff’s diagnoses as somatization disorder,
18 depressive disorder, anxiety disorder, low back pain, and bilateral knee pain. Tr.
19 426. In his second opinion, he listed Plaintiff’s diagnoses as arthritis in the knees
20 and lumbar spine and anxiety/depression. Tr. 585. However, there are no
21 treatment records from Dr. Brooks in the administrative record. Therefore, the
22 ALJ rejected the opinion of the treating physician, Dr. Brooks, because the
23 evidence did not support his opinion, without considering any evidence of Dr.
24 Brooks’ treatment and examinations.

25 When Plaintiff applied for benefits and the various points of appeal, she did
26 not list Dr. Brooks or his practice, Columbia River Medical Center, as a provider.
27 Tr. 309-11, 330-31, 337-38. However, the record demonstrates that Dr. Brooks
28 was listed as Plaintiff’s primary care provider as early as December 2014. Tr. 443,

1 446. Plaintiff's attorney reported at the first hearing, that he had requested records
2 from Dr. Brooks and the ALJ agreed to leave the record open to receive this
3 evidence. Tr. 45. At the second hearing, the ALJ indicated that the Agency had
4 some issues getting records from Dr. Brooks in other cases. Tr. 69. The Court
5 acknowledges that Plaintiff's counsel never requested that the ALJ subpoena
6 records, but there is evidence that Dr. Brooks was treating Plaintiff because her
7 specialists were copying her records to him and instructing her to follow up with
8 him. Tr. 443, 446, 452, 578.

9 The Court will not find error on the part of the ALJ because Plaintiff failed
10 to request assistance in gathering the missing records and the ALJ allowed
11 additional time for Plaintiff's counsel to submit the outstanding records at the first
12 hearing. Tr. 45. However, since a remand is necessary in this case for the ALJ to
13 properly address steps four and five, the ALJ is instructed to gather the missing
14 records from Dr. Brooks. If this evidence is unavailable due to the circumstances
15 surrounding Dr. Brooks' medical license as addressed in the second hearing, Tr.
16 67-71, the ALJ will send Plaintiff for a medical and psychological consultative
17 examination prior to any additional proceedings.

18 **4. Step Two**

19 Plaintiff challenges the ALJ's step two determination that arthritis and
20 anxiety were not medically determinable, severe impairments. ECF No. 9-11.

21 Considering the ALJ has been instructed to develop the record concerning
22 both Plaintiff's physical and psychological medical impairments, he will make a
23 new step two determination on remand.

24 **5. Medical Opinions**

25 Plaintiff argues the ALJ failed to properly consider and weigh the medical
26 opinions expressed by her treating provider, Dr. Brooks. ECF No. 11-14.

27 Once again, the ALJ's development of the record will require him to
28 readdress the opinion of Dr. Brooks on remand.

1 **6. Plaintiff's Symptom Statements**

2 Plaintiff contests the ALJ's determination that Plaintiff's symptom
3 statements were unreliable. ECF No. 15 at 17-19.

4 The ALJ found Plaintiff's statements concerning the intensity, persistence,
5 and limiting effects of her symptoms to be "not entirely consistent with the medical
6 evidence and other evidence in the record." Tr. 30-31. The evaluation of a
7 claimant's symptom statements and their resulting limitations relies, in part, on the
8 assessment of the medical evidence. See 20 C.F.R. §§ 404.1529(c), 416.929(c);
9 S.S.R. 16-3p. Therefore, in light of the case being remanded for the ALJ to
10 develop the record and readdress the medical source opinions in the file, a new
11 assessment of Plaintiff's subjective symptom statements will be necessary.

12 **REMEDY**

13 The decision whether to remand for further proceedings or reverse and
14 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
15 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
16 where "no useful purpose would be served by further administrative proceedings,
17 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
18 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
19 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
20 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
21 (noting that a district court may abuse its discretion not to remand for benefits
22 when all of these conditions are met). This policy is based on the "need to
23 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are
24 outstanding issues that must be resolved before a determination can be made, and it
25 is not clear from the record that the ALJ would be required to find a claimant
26 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
27 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
28 F.3d 1172, 1179-80 (9th Cir. 2000).

1 In this case, it is not clear from the record that the ALJ would be required to
2 find Plaintiff disabled if all the evidence were properly evaluated. Further
3 proceedings are necessary for the ALJ to develop the record by gathering the
4 outstanding evidence from Dr. Brooks or completing medical and psychological
5 consultative evaluations, making a new step two determination, readdressing Dr.
6 Brooks' opinions, readdressing Plaintiff's symptom statements, making a new step
7 four determination, and, if necessary, making a new step five determination.
8 Additionally, the ALJ will supplement the record with any outstanding evidence
9 and call a vocational expert to testify in the remand proceedings.

10 CONCLUSION

11 Accordingly, **IT IS ORDERED:**

12 1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is
13 **DENIED**.

14 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is
15 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
16 additional proceedings consistent with this order.

17 3. Application for attorney fees may be filed by separate motion.

18 The District Court Executive is directed to file this Order and provide a copy
19 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
20 **and the file shall be CLOSED.**

21 DATED March 5, 2019.



A handwritten signature in black ink, appearing to be "M" or "Rodgers".

22
23 JOHN T. RODGERS
24 UNITED STATES MAGISTRATE JUDGE
25
26
27
28